Supreme Court, U. S.
FILED
SEP - 2 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM 1980

No. 80-163

IN RE
CHESTNUTT MANAGEMENT CORPORATION,
Petitioner,

v.

HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, CIRCUIT JUDGES, AND THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

and

ELEANOR C. MILLER,

Respondent.

BRIEF OF THE RESPONDENT, ELEANOR C. MILLER, IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS

Peter M. Ryan, Esquire
Ten Corbin Drive
Darien, Connecticut 06820
(203) 655-9708

Samuel S. Cross, Esquire
500 Summer Street
Stamford, Connecticut 06901
(203) 359-4300

Counsel for Respondent

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	iii
Preliminary Statement	1
Jurisdictional Statement	2
Questions Presented	2
Statement of the Case	3
Argument	7
POINT I THE COURT OF APPEALS' ORDER COMPLIED WITH THE SUPREME COURT'S ORDER OF REMAND. THE PETITIONER'S THEORY THAT THE SUPREME COURT'S ORDER OF REMAND REQUIRED A DISMISSAL OF THE ACTION IS WITHOUT FOUNDATION	7
POINT II THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT ON THE BASIS OF THE DEFENDANT'S COMMON LAW FRAUD AND THE GENERAL JURY VERDICT FOR THE PLAINTIFF	12
POINT III MANDAMUS IS NOT AN AVAILABLE REMEDY TO REVIEW THE FIRST AMENDMENT CLAIM OF PETITIONER, BUT IN ANY	

Page

EVENT, THE PETITIONER HAS NOT PRESENTED A FIRST AMENDMENT CLAIM MERITING REVIEW BY THIS COURT 12

Conclusion 16

Signature 16

TABLE OF AUTHORITIES

Cases:	Page
Adkins v. *Ford Motor Co.*, 446 F.2d 1105 (6th Cir. 1971)	14
Bankers Life & Casualty v. *Holland*, 346 U.S. 379 (1953)	7
Bates v. *State Bar of Arizona*, 433 U.S. 350, *reh. denied* 434 U.S. 881 (1977)	15
Baxter v. *Palmigiano*, 425 U.S. 308 (1976)	12
Central Hudson Gas & Electric v. *Public Service Commission*, 48 U.S. L.W. 4683 (June 20, 1980)	15
Chestnutt Management Corp. v. *Miller*, 444 U.S. 959, 100 S.Ct. 443 (1979)	2,4
Consolidated Edison v. *Public Service Commission*, 48 U.S. L.W. 4776 (June 20, 1980)	15
DeBeers Consolidated Mines v. *United States*, 325 U.S. 212 (1945)	7
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185, *reh. denied* 425 U.S. 986 (1976)	10
Filisko v. *Bridgeport Hydraulic Co.*, 176 Conn. 33, 404 A.2d 889 (1978)	13
Firemen's Ins. Co. v. *Follett*, 72 F.2d 49 (7th Cir.), *cert. denied* 293 U.S. 618 (1934)	14
Forsyth v. *Hammond*, 166 U.S. 506 (1897)	8
Goldfarb v. *Virginia State Bar*, 421 U.S. 773, *reh. denied* 423 U.S. 886 (1975)	9

	Page
Henry v. *City of Rock Hill,* 375 U.S. 6 (1963), *on remand* 244 So.C. 74, 135 S.E.2d 718 (1963), *rev'd* 376 U.S. 776 (1964)	9,10
Hermann v. *Brownell,* 274 F.2d 842 (9th Cir.), *cert. denied sub. nom. Herrmann* v. *Rogers,* 364 U.S. 821 (1960)	11
Illinois Bell Telephone Co. v. *Slattery,* 102 F.2d 58 (7th Cir. 1939), *cert. denied 30 U.S. 648 (1939)*	11
John Nuveen & Co., Inc. v. *Sanders,* 425 U.S. 929 (1976), *on remand* 554 F.2d 790 (7th Cir. 1977)	10,11
Keet v. *Service Machine Company, Inc.,* 472 F.2d 138 (6th Cir. 1972)	13
Kerr v. *United States District Court,* 426 U.S. 394 (1976)	7
Lash v. *Aikens,* 425 U.S. 947, *on remand* 547 F.2d 372 (7th Cir. 1976)	12
Morrissey v. *National Maritime Union of America,* 544 F.2d 19 (2nd Cir. 1976)	13
Re Sanford Fork & Tool Company, 160 U.S. 247 (1895)	10
Richmond Newspaper Inc. v. *Virginia,* 48 U.S. L.W. 5008 (July 2, 1980)	15
Roche v. *Evaporated Milk Ass'n.,* 319 U.S. 21 (1943)	7

	Page
Schlagenhauf v. *Holder*, 379 U.S. 104 (1964)	14
Sprague v. *Ticonic National Bank*, 307 U.S. 161 (1939)	10
Stephenson v. *Grand Trunk Western R. Co., 110 F.2d 401 (7th Cir.), app. dismissed* 311 U.S. 720 (1940)	14
Tracy v. *Finn Equipment Co.*, 290 F.2d 498 (6th Cir.), *cert. denied* 368 U.S. 826 (1961)	14
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11, 100 S.Ct. 242 (1979)	4,5,7, 8,12
United States v. *National Society of Professional Engineers*, 389 F.Supp 1193 (D.D.C. 1974), *vacated* 422 U.S. 1031 (1975), *on remand* 404 F.Supp. 457 (D.D.C. 1975), *aff'd* 555 F.2d 978 (D.C. Cir. 1977) *aff'd* 435 U.S. 679 (1978)	9
Virginia State Bd. of Pharmacy v. *Virginia Citizen Consumer Council*, 425 U.S. 748 (1976).....	15
Volasco Products Co. v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied* 372 U.S. 907 (1963)	13
Watts v. *Mack Trucks, Inc.*, 491 F.2d 601 (6th Cir. 1974)	13
Will v. *United States*, 389 U.S. 90 (1967)	7
W.M.C.A., Inc. v. *Simon*, 370 U.S. 190 (1962).....	7

	Page
Ziman v. *Whitely*, 110 Conn. 108, 147 Atl. 370 (1929)	13,14
Statutes and Rules:	
Investment Advisers Act of 1940	
15 U.S.C. §80b-6	3
Securities Act of 1933	
15 U.S.C. §77l(2)	10
15 U.S.C. §77q	10
Securities Exchange Act of 1934	
15 U.S.C. §78j(b)	10
15 U.S.C. §78t	10
Sherman Antitrust Act, 15 U.S.C. §1	9
28 U.S.C. §1254	8
28 U.S.C. §1257	8
28 U.S.C. §1651(a)	2

In The

Supreme Court of the United States

OCTOBER TERM 1980

No. 80-163

IN RE
CHESTNUTT MANAGEMENT CORPORATION,
Petitioner,

v.

HONORABLE WILLIAM H. TIMBERS, HONORABLE ELLSWORTH A. VAN GRAAFEILAND, HONORABLE STERRY R. WATERMAN, CIRCUIT JUDGES, AND THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents,

and
ELEANOR C. MILLER,

Respondent.

BRIEF OF THE RESPONDENT, ELEANOR C. MILLER, IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF MANDAMUS

PRELIMINARY STATEMENT

The respondent, Eleanor C. Miller ("Mrs. Miller"), respectfully requests that this Court deny the petition of Chestnutt Management Corporation ("Chestnutt") for a writ of mandamus as well as Chestnutt's motion for leave to file such a petition.

The motion and petition arise from a decision, dated March 31, 1980, of the United States Court of Appeals for the Second Circuit, which, upon remand from the United States Supreme Court, affirmed a judgment based on a jury verdict in the United States District Court for the District of Connecticut in favor of Mrs. Miller in the amount of $53,000. Chestnutt subsequently moved before the Court of Appeals for a rehearing and suggested a rehearing *en banc.* That motion and the suggestion were denied by orders of the Second Circuit dated May 28, 1980.*

JURISDICTIONAL STATEMENT

To the extent this Court has jurisdiction in this case to issue a writ of mandamus, jurisdiction is based upon 28 U.S.C. §1651(a) as set forth in Chestnutt's petition at page 10.

QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the Second Circuit acting in conformance with this Court's November 26, 1979 order in *Chestnutt Management Corp.* v. *Miller,* 444 U.S. 959 (1979) in reaffirming its prior judgment in favor of Mrs. Miller on the basis of defendant's common law fraud alone?

2. Was the United States Court of Appeals correct in applying Connecticut law in reaffirming the judgment in favor of Mrs. Miller where the case had been submitted to the jury on claims arising under both state and federal law and affirmed as to both claims and when the claim under federal law was subsequently held invalid by this Court?

---

*The March 31, 1980 and May 28, 1980 orders of the Court of Appeals are printed in full at pp. 1a-7a of the Appendix to the petition for a writ of mandamus.

3. Is a writ of mandamus an available remedy to review a claim of First Amendment protection for commercial practices and communications which have been found to be misleading, deceptive and fraudulent, especially when such a claim was not raised on remand and only tangentially argued on the original appeal? Assuming there is jurisdiction, is there any merit to the claim that the First Amendment protects such commercial speech?

STATEMENT OF THE CASE

Mrs. Miller commenced this action against Chestnutt for money damages in 1972. After a three day trial in October, 1975 the case was submitted to a jury on two claims: that Chestnutt had (1) committed fraud at common law, and (2) violated Section 206 of the Investment Advisers Act of 1940, 15 U.S.C. §80b-6.* The jury of six returned a general verdict in favor of Mrs. Miller in the amount of $53,000. Chestnutt did not request a special verdict and did not submit any interrogatories to the jury.

Following the jury verdict, Chestnutt moved for a new trial or, in the alternative, for judgment notwithstanding the verdict. The motion was denied by order of the trial judge, Thomas J. Murphy, on September 19, 1977.

Chestnutt appealed the order to the United States Court of Appeals for the Second Circuit which affirmed the judgment and order in a unanimous decision rendered from the bench after oral argument on April 3, 1978. 578 F.2d 1368 (2d Cir. 1978). In accordance with its local rule, the Second Circuit

---

*The substantial amount of evidence supporting the claims that Chestnutt had committed fraud at common law and violated the Investment Advisers Act was briefly reviewed in Mrs. Miller's brief, dated October 20, 1978, in opposition to Chestnutt's petition for certiorari previously filed with this Court (No. 78-463).

panel issued a short oral statement setting forth the reasons for its decision. The statement made clear that the Second Circuit affirmed the District Court judgment both on the ground that Chestnutt had violated the Investment Advisers Act and on the basis that Chestnutt had committed common law fraud:

> Moreover, Chestnutt's intentional failure to disclose its prior performance in bear markets we hold constituted a sufficiently material non-disclosure to support a jury finding of common law fraud.*

Chestnutt subsequently petitioned the Court of Appeals for a rehearing and suggested *en banc* consideration. The petition and suggestion were denied without exception and Chestnutt filed a petition for certiorari in this Court on September 18, 1978 (No. 78-463).

Both Chestnutt's petition and Mrs. Miller's brief in opposition presented, *inter alia,* the question of whether a private right of action existed under the Investment Advisers Act. While Chestnutt's petition was pending, this Court decided *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 100 S. Ct. 242 (1979) and held that:

> there exists a limited private remedy under the Investment Advisers Act of 1940 to void an investment adviser's contract, but that the Act confers no other private causes of action, legal or equitable.

444 U.S. 11, 24, 100 S.Ct.242, 249 (1979).

Less than two weeks later, on November 26, 1979, the Supreme Court issued the following order in this case:

---

*The complete statement of the Court of Appeals is found at pages A23-A25 of the appendix to Chestnutt's petition for certiorari in No. 78-463.

> Motion of Investment Counsel Association of America, Inc. for leave to file a brief, as *amicus curiae* is granted. Petition for a writ of certiorari is granted. Judgment is vacated and case remanded to the Court of Appeals for further consideration in light of *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* _____ U.S. _____ (1979).

444 U.S. 959, 100 S. Ct. 443 (1979).

On remand, the United States Court of Appeals for the Second Circuit, after ordering the original District Court judgment vacated, took the case under reconsideration. Following the submission of briefs, the Second Circuit panel (Waterman, Timbers and Van Graafeiland, JJ.) reaffirmed the original judgment on the grounds of Chestnutt's common law fraud in the following words:

> This Court originally affirmed the judgment of the district court, holding that the evidence at trial was sufficient to support the jury verdict for appellee on both her claim based on common law fraud and her claim based on a violation of the Investment Advisers Act of 1940, 15 U.S.C. §80b-6 (1976). In light of the Supreme Court's decision in *Transamerica Mortgage Advisors, supra,* we hold that appellee's claim under the Investment Advisers Act no longer is viable and, to the extent the judgment was based on the claim, the judgment stands vacated. Our decision of April 3, 1978, however, expressly held that the common law fraud claim was properly submitted to the jury and was fully supported by evidence at trial. This part of our judgment remains unaffected by the Supreme Court's order.

Following the Second Circuit's decision, Chestnutt moved for a rehearing and suggested a rehearing by the Court of Appeals *en banc.* The motion and suggestion were denied by orders dated May 28, 1980.

Chestnutt has now moved before this Court seeking an order requiring Judges Waterman, Timbers and Van Graafeiland and the Second Circuit Court of Appeals as a whole to show cause why a writ of mandamus should not issue requiring them to dismiss this action in its entirety.

ARGUMENT

POINT I

THE COURT OF APPEALS' ORDER COMPLIED WITH THE SUPREME COURT'S ORDER OF REMAND. THE PETITIONER'S THEORY THAT THE SUPREME COURT'S ORDER OF REMAND REQUIRED A DISMISSAL OF THE ACTION IS WITHOUT FOUNDATION.

The Supreme Court has repeatedly held that the issuance of a writ of mandamus, which is sought in this action by Chestnutt, is limited to the most exceptional and extraordinary circumstances requiring drastic remedies. See e.g. *Kerr* v. *United States District Court,* 426 U.S. 394 (1976); *Will* v. *United States,* 389 U.S. 90 (1967). Mandamus has been used only to confine a lower court to its proper jurisdiction. *Roche* v. *Evaporated Milk Ass'n.,* 319 U.S. 21 (1943). It has been directed to a lower court only when there has been a usurpation of judicial power or a clear abuse of power or discretion. *Bankers Life & Casualty Co.* v. *Holland,* 346 U.S. 379 (1953); *DeBeers Consolidated Mines* v. *United States,* 325 U.S. 212 (1945).

Chestnutt's petition for the extraordinary writ of mandamus contends that this Court's November 26, 1979 order in this case left the Court of Appeals no discretion on the remand and that the order was tantamount to a dismissal of the complaint in its entirety. Such a contention disregards the plain and unambiguous language of this Court's order, which remanded the case for "further consideration in light of" *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979). Neither the language nor the intent of this "well-established practice of a remand for consideration in light of a subsequent decision," *W.M.C.A., Inc.* v. *Simon,* 370 U.S. 190, 191 (1962), constituted a decision on the merits of this case nor a direction for the Court of Appeals to dismiss the action.

This Court's order of vacation and remand "in light of *Transamerica* v. *Lewis*" contains no hint that the Court rendered a decision on, or even considered, the merits of any claim presented by the parties and, *a fortiori,* there is no indication, implicit or explicit, that the Supreme Court held the plaintiff's common law fraud cause of action to be unsupported or inadequate.

The granting of the petition for certiorari was necessary for the Supreme Court to exercise its jurisdiction at that stage of the proceedings. The corollary orders to vacate and remand addressed none of the questions presented in Chestnutt's petition and are entirely neutral as to the merits of the case. If this Court had reached the merits of the common law fraud claim, it certainly had the power to affirm or reverse the judgment. Having done neither, its order cannot be read to reverse *sub silentio* the Court of Appeals' explicit affirmance of the common law fraud claim.

Although its brief is not clear, Chestnutt appears to contend that this Court, upon holding in *Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra* that no private right of action for damages existed under the Investment Advisers Act and exercising its certiorari jurisdiction to vacate the judgment in this case and remand the case to the Court of Appeals, by implication held that plaintiff's common law fraud cause of action was inadequate or faulty. This convoluted, and at best speculative, argument is based on a misunderstanding of the proper application of the Supreme Court's discretionary doctrine of "adequate state grounds". This doctrine, of course, is generally applied in review of cases arising from state courts under the limited jurisdictional grounds of 28 U.S.C. §1257. It is not applicable to the general comprehensive and unlimited supervisory appellate jurisdiction which the Supreme Court has over federal court cases under 28 U.S.C. §1254. See *Forsyth* v. *Hammond,* 166 U.S. 506 (1897). Furthermore, Chestnutt's argument quite ignores the plain fact that having held in *Transamerica* that no cause of action for damages exists under the Investment Advisers Act, this Court, if it had held that Mrs. Miller's com-

mon law fraud claim was also invalid, would have reversed the Court of Appeals judgment rather than order a remand for further consideration.

An argument analogous to Chestnutt's was presented and soundly rejected in *United States* v. *National Society of Professional Engineers.* In that case, the District Court initially entered judgment for the plaintiffs on claims brought under the Sherman Anti-Trust Act. 389 F. Supp. 1193 (D.C. 1974). On direct appeal to the Supreme Court the judgment was vacated and remanded for consideration in light of the Court's then recent decision in *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). *National Society of Professional Engineers* v. *United States,* 422 U.S. 1031 (1975). On remand, the defendants argued that because the case was not affirmed by the Supreme Court the total implication was that the judgment for plaintiff should be reversed. Both the District Court, which re-entered judgment for the plaintiff (404 F. Supp. 457) and the District of Columbia Court of Appeals rejected this contention, with the latter court stating:

> We see no warrant for this speculative reconstruction. The Supreme Court had just decided *Goldfarb;* instead of taking the time to engage in a detailed study of cases involving closely related issues, it requested the district court to do so.

555 F.2d 978, 982 (D.C. Cir. 1977). This Court agreed and affirmed the judgment for the plaintiff after specifically noting its previous remand and the subsequent re-entry of the original judgment. 435 U.S. 679 (1978).

In *Henry* v. *City of Rock Hill,* 375 U.S. 6 (1963) the Supreme Court granted certiorari, vacated a judgment against Henry and others, and remanded the case to the Supreme Court of South Carolina for further consideration. The South Carolina Supreme Court concluded that the remand was not a determination on the merits, and this conclusion was thereafter explicitly approved by the Supreme Court, which described its practice of

remand for consideration in light of a subsequent decision, as follows:

> That has been our practice in analogous situations where, not certain that the case was free from all obstacles to reversal on an intervening precedent, we remand the case to the State Court for reconsideration.

Henry v. *City of Rock Hill,* 376 U.S. 776 (1964).

By its order of remand, dated November 26, 1979, this Court simply instructed the Second Circuit to consider further its prior judgment in favor of Mrs. Miller by taking into account the *Transamerica* decision limiting a private right of action under the Investment Advisers Act. Chestnutt's argument to the contrary notwithstanding, the Court of Appeals was not limited to considering this action solely in light of the Investment Advisers Act. Neither the Supreme Court decision in *Transamerica* nor its order in this case touched upon or affected the plaintiff's common law fraud claim. The plaintiff was free to urge entry of judgment on any grounds unaffected by the intervening Supreme Court decision and the Court of Appeals was likewise free to take any action not foreclosed by the Supreme Court mandate. *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939); *Re Sanford Fork & Tool Company,* 160 U.S. 247 (1895).

This point is made clear in *John Nuveen & Co., Inc.* v. *Sanders,* 425 U.S. 929 (1976), a securities action in which the plaintiff alleged claims under Sections 12(2) and 17 of the Securities Act of 1933 and Sections 10(b) and 20 of the Securities Exchange Act of 1934. The Supreme Court granted a petition for certiorari, vacated an order of the Court of Appeals for the Seventh Circuit in favor of the plaintiff and remanded the case for further consideration in light of its recent decision interpreting Section 10(b) in *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1976). On remand the Seventh Circuit specifically held that in addition to considering the Section 10(b) claim in the light of *Hochfelder* it was free to examine the other claims set forth by the plaintiff. After determining that *Hochfelder*

required a dismissal of the Section 10(b) claim, the Court of Appeals stated:

> Therefore, at this point, as we now view the case, we must determine whether we are compelled to allow Nuveen's motion for summary reversal of the judgment below, or whether upon remand to this court the permissible scope of our reconsideration is broad enough to permit consideration of other pleaded issues which were originally present in the case and which were not expressly or impliedly ruled upon by the Supreme Court in *Hochfelder.* We may not contravene a specific instruction or disregard the disposition of any question of law contained in the mandate. Nuveen relies on *Hermann* v. *Brownell,* 274 F.2d 842 (9th Cir. 1960), *cert. denied sub. nom., Herrmann* v. *Rogers,* 364 U.S. 821, 81 S.Ct. 56, 5 L.Ed.2d 50, but that case stands only for the proposition that upon remand the jurisdiction of an appellate court is limited to those particularized points which were assigned for consideration, if the mandate was in that form. However, the remand in the present case was broadly stated to be "for further consideration in light of *Hochfelder.*" Other issues not within the compass of the mandate are thereby not precluded from consideration. *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 59 S.Ct., 777, 83 L.Ed. 1184 (1939). See also *Illinois Bell Telephone Co.* v. *Slattery,* 102 F.2d 58 (7th Cir. 1938), *cert. denied,* 307 U.S. 648, 59 S.Ct. 1044, 83 L.Ed. 1257 (1939).
>
> Following that view we must next examine the other causes alleged by plaintiff and an additional approach urged by Amicus Curiae.

Sanders v. *John Nuveen & Co., Inc.,* 554 F.2d 790, 793-4 (7th Cir. 1977).

In *Lash* v. *Aikens,* 425 U.S. 947 (1976) the Supreme Court granted certiorari, vacated and remanded the judgment for "consideration in light of" its recent decision in *Baxter* v. *Palmigiano,* 425 U.S. 308 (1976) which had held that prison officials were not required to give written reasons for refusing a prisoner the right to cross-examine witnesses in disciplinary transfer hearings. The *Lash* case involved numerous issues of prison procedure and discipline, and, on remand, the Seventh Circuit reinstated its prior opinion and judgment dealing with these issues after striking only the holding requiring written reasons as called for in the *Baxter* decision. *Aikens* v. *Lash,* 547 F.2d 373 (7th Cir. 1976).

The above cases make clear that an order requiring consideration "in light of" a recent Supreme Court decision does not mandate that the Court of Appeals must enter a judgment reflecting that decision only, when the case before it presents other issues and grounds for action. Therefore, the Second Circuit Court of Appeals was free to act on the other ground for affirmance available in this case, and was correct in holding that the part of the judgment based on the common law fraud claim was unaffected by the Supreme Court's decision in *Transamerica.*

POINT II

THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT ON THE BASIS OF DEFENDANT'S COMMON LAW FRAUD AND THE GENERAL JURY VERDICT FOR PLAINTIFF

As set forth in Point I, *supra,* the Court of Appeals was free to take any action consistent with the Supreme Court's decision in *Transamerica.* On remand, the plaintiff conceded that her claim under the Investment Advisers Act was no longer a viable cause of action in light of the holding of *Transamerica,* but contended that her claim based on the defendant's fraud at common law remained unaffected by that decision. The case had

been submitted to the jury on counts of both common law fraud and fraud under the Investment Advisers Act. The defendant had not made any request for a special verdict or interrogatories. A general verdict was rendered for the plaintiff in the amount of $53,000. The Court of Appeals had previously found the evidence of fraud adduced by the plaintiff at trial to be sufficient to support a jury verdict for the plaintiff on either or both claims. Thus, to comply with the order of remand in the present case, all the Court of Appeals found it necessary to do was strike from its previous decision the ground for affirming the District Court's judgment based upon Chestnutt's fraud under the Investment Advisers Act, and reaffirm the District Court judgment on the ground of common law fraud.

The Court of Appeals went on to hold, correctly, that the common law fraud claim, supported by diversity jurisdiction, should be governed by the substantive law of Connecticut.

It is settled law in Connecticut that:

> where a complaint is divided into counts and a general verdict is rendered, if any of the counts are good, it will be presumed that the damages were assessed as to that count and the verdict will be sustained.

Ziman v. *Whitley,* 110 Conn. 108, 112, 147 Atl. 370, 372-3 (1929). This rule has been consistently applied by the Connecticut courts. See e.g. *Filisko* v. *Bridgeport Hydraulic Co.,* 176 Conn. 33, 404 A.2d 889 (1978).

The Connecticut rule differs from that occasionally employed in federal court in federal question cases. See, e.g., *Morrissey* v. *National Maritime Union of America,* 544 F.2d 19 (2nd Cir. 1976); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.,* 308 F.2d 383 (6th Cir. 1962), *cert. denied* 372 U.S. 907 (1963). However, those cases which have analyzed the effect of a general verdict in diversity cases involving state law questions have consistently held that the appropriate state rule should be followed. *Watts* v. *Mack Trucks, Inc.,* 491 F.2d 601 (6th Cir. 1974); *Keet*

v. *Service Machine Company, Inc.*, 472 F.2d 138 (6th Cir. 1972); *Adkins* v. *Ford Motor Co.*, 446 F.2d 1105 (6th Cir. 1971); *Tracy* v. *Finn Equipment Co.*, 290 F.2d 498 (6th Cir.), *cert. denied* 368 U.S. 826 (1961); *Stephenson* v. *Grand Trunk Western R. Co.*, 110 F.2d 401 (7th Cir.), *app. dismissed* 311 U.S. 720 (1940); *Firemen's Ins. Co.* v. *Follett*, 72 F.2d 49 (7th Cir.), *cert. denied* 293 U.S. 618 (1934).

Since the common law fraud claim asserted by Mrs. Miller was based *in toto* on the law of Connecticut, it is submitted that the Court of Appeals was correct in applying the Connecticut rule set forth in *Ziman* v. *Whitley, supra* and in reaffirming the District Court judgment on the basis of the substantial evidence supporting a finding of common law fraud.

POINT III

MANDAMUS IS NOT AN AVAILABLE REMEDY TO REVIEW THE FIRST AMENDMENT CLAIM OF PETITIONER, BUT IN ANY EVENT THE PETITIONER HAS NOT PRESENTED A FIRST AMENDMENT CLAIM MERITING REVIEW BY THIS COURT

As set forth in Point I, *supra,* the extraordinary writ of mandamus is limited to those circumstances in which a lower court has clearly transgressed the bounds of its jurisdiction or discretionary powers. The writ is not the appropriate remedy when other avenues of review are available especially when the most that can be asserted is that the lower court has ruled in error on matters within its jurisdiction. *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964). Mrs. Miller submits that Chestnutt's vague and belatedly raised contention of First Amendment protection is not a matter for consideration by the Supreme Court in this motion and petition. Nevertheless, should this Court choose to treat the petition as one for certiorari, Mrs. Miller reiterates the arguments presented in her original brief in opposition to the petition for certiorari (No. 78-463) that the claimed issue of impairment of First Amendment rights first raised by Chestnutt in its reply brief on appeal in the Court of Appeals does not merit review by the Supreme Court.

Commercial speech, while accorded limited protection under the First Amendment, is properly subject to regulation to insure that the "stream of commercial information flow cleanly as well as freely". *Virginia State Board of Pharmacy* v. *Virginia Citizen Consumer Council,* 425 U.S. 748, 772 (1976). As this Court has stated:

> [A]dvertising that is false, deceptive, or misleading of course is subject to restraint. (citation omitted). Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure truthfulness will discourage protected speech....Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.

Bates v. *State Bar of Arizona,* 433 U.S. 350, 383 (1979).

Nothing in *Consolidated Edison* v. *Public Service Commission,* 48 U.S.L.W. 4776 (June 20, 1980), *Central Hudson Gas & Electric* v. *Public Service Commission,* 48 U.S. L.W. 4783 (June 20, 1980) and *Richmond Newspapers Inc.* v. *Virginia,* 48 U.S. L.W. 5008 (July 2, 1980), the cases cited by petitioner, undermines this view.

Petitioner would have this Court view the decision and judgment below as a direct infringement of the right to publish financial opinion. This case, however, does not affect the right to publish or express views; very simply, it involves the obligations of Chestnutt, having sought and induced reliance by means of such expression, to act in a way which is not misleading or deceitful. The Court of Appeals correctly ignored petitioner's belated argument that the First Amendment insulated a paid investment adviser from its fiduciary responsibilities not to practice frauds and deceits upon clients.

CONCLUSION

For the foregoing reasons the motion for leave to file a petition for a writ of mandamus and the petition itself should be denied.

Dated: Stamford, Connecticut
August 29, 1980

Respectfully submitted,

PETER M. RYAN
Ten Corbin Drive
Darien, Connecticut 06820
(203) 655-9708

SAMUEL S. CROSS
500 Summer Street
Stamford, Connecticut 06901
(203) 359-4300